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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

RICHARD M. PATTERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK R. MARO, ESQUIRE
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Attorney for Petitioner

44pp

QUESTION PRESENTED

I.

Whether the Court of Appeals failed to appropriately exercise its jurisdiction and improperly dismissed Patterson's appeal of the District Court's denial of his **Rule 33** petition for new trial, predicated upon newly discovered evidence, upon the finding that it, as well as the trial court, lacked jurisdiction to hear same under **United States v. Smith, 62 F.3d 641 [4th Cir. 1995]** and **Fed.R.Crim.P. 33.**

PARTIES TO THE PROCEEDING

The Petitioner in this criminal case are the Appellant/Defendant in this subject action. The Respondent is the United States of America.

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The Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., infra, A) is attached as is the Opinion of the Trial Court (App., infra, B).

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on November 19, 2001. The jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1).

That the Court of Appeals jurisdiction was filed predicated upon 28 U.S.C. §1291 predicated upon a review of a conviction in a federal criminal case.

CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

18 U.S.C. §120A
28 U.S.C. 1254[1]
28 U.S.C. §1291
Fed.R.Crim.P. 33

STATEMENT OF THE CASE

1. On or about the 19th day of February, 1997, an indictment was returned by the grand jury charging the Appellant with one count of Kidnaping under 18 U.S.C. §120A.

2. The matter went forth to trial and the defendant was convicted by a jury on April 23, 1997.

3. Appellant was sentenced on August 1, 1997 with a judgment of conviction being entered on September 5, 1997, wherein, the defendant received a 10 year Department of Corrections sentence.

4. Appellant filed a direct appeal of his conviction on August 6, 1997.

5. Appellant subsequently voluntarily dismissed his pending direct appeal via motion which the Court granted on January 12, 1998.

6. Appellant then sought relief under 28 U.S.C. §2255 "Ineffective Assistance of Trial Counsel" and filed such petition on March 13, 1998.

7. That Appellant's action under 28 U.S.C. §2255 "Ineffective Assistance of Trial Counsel" was heard by the trial court and denied by Order, without hearing, on October 8, 1998.

8. The matter was brought forth for review before the Fourth Circuit Court of Appeals and was denied on May 5, 1999.

9. The Appellant's request for an En Banc rehearing petition was filed on June 6, 1999 and denied on August 9, 1999.

10. On July 26, 2000, the Appellant brought an action under Rule 33 requesting a new trial predicated upon newly discovered evidence.

11. The trial court, after reviewing the motion with its factual allegations and supporting legal citations, accepted the motion and ordered the government to respond.

12. The issues were briefed and neither the trial court nor the government, in its response, addressed the lack of the court's jurisdiction to hear the matter.

13. The trial court did in fact review the motion and supporting memorandum of law from the Appellant and the government and subsequently entered an Order denying the Appellant's Rule 33 motion on March 28, 2001, with opinion and supporting memorandum. (App., infra, B)

14. An appeal was taken to the Fourth District Court of Appeals of the trial court's denial order.

15. Appellant's brief was filed.

16. The government filed its answer brief raising the issue of the trial court's apparent lack of jurisdiction to hear the Appellant's request for a new trial, predicated upon newly discovered evidence, as being untimely. The government relied upon the fact that [1] the motion was made more than two years after Patterson's appeal of conviction was dismissed [January 12, 1998]; [2] that the three year period under the current version of Rule 33 only applies to cases commenced after December 1, 1998 or criminal cases then pending.

17. Appellant filed his reply brief indicating that the 1998 amendment reflected that the time commenced from entry of the "final judgment". It could be presented, in accordance with United States vs. Reyes, 49 F.3d 63, 66 [2nd Cir. 1995] that issuance of the Mandate would be the triggering of the time consequence. Also see, Wright, Federal Practice and Procedure; Criminal 2d §557.

18. The appellate court entered this [its] Order of dismissal, predicated upon the trial court's lack of jurisdiction to hear the Rule 33 motion. (Appendix A)

19. The Court of Appeals entered its Order of dismissal on November 19, 2001,

however, counsel for appellant did not receive the initial copy of the dismissal Order.

20. In fact, counsel for the Appellant did not become aware of the Court's November 19, 2001 ruling until the Mandate of January 11, 2002 was received by counsel.

21. Once Appellant's counsel received the mandate and a subsequent copy of the November 19, 2001 decision authorizing the dismissal, Appellant's remedial remedies were time barred since it could not seek a re-hearing nor petition in En Banc review.

22. In fact, the only remedy left to the Appellant was the bringing forth of this matter to the Court, timely.

REASONS FOR GRANTING THE PETITION

1. Patterson claims that his Rule 33 motion requesting a new trial predicated upon newly discovered evidence was in fact timely filed and under the jurisdiction of the trial court when it entered its Order denying same on the merits. That the subsequent appeal of the trial court's order to the Fourth District Court of Appeals was appropriate and the Court should have exercised its authority to review same. That the dismissal of the appeal was improper.

2. Patterson further claims that this cause is of importance to establish the specific date in which the commencement of the three year period is initiated, whether it be at the verdict rendered by a jury or the execution of the final judgment of guilt by the court.

CONCLUSION

This Petition for a Writ of Certiorari should be granted for the purposes of clarification of the law concerning jurisdiction as to when the time commences on a Rule 33 motion for a new trial predicated upon newly discovered evidence for the purposes of determining jurisdiction upon a District Court to hear same.

DATED the 14th day of February, 2002.

Respectfully submitted,

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Attorney for Petitioner

No. _____

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

APPENDIX 1a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-6707

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

RICHARD M. PATTERSON,
Defendant-Appellant.

Appeal from the United States District Court of the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge (CR-97-60)

Submitted: October 24, 2001
Decided : November 19, 2001

Before WILLIAMS, TRAXLER and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jack R. Maro, Ocala, Florida, for Appellant. Kenneth E. Melson, United States Attorney, William H. Stallings, Special Assistant United States Attorney, Alexandria Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Richard M. Patterson appeals the district court's order denying his motion for a new trial under Fed. R. Crim. P. 33. We have reviewed the record and find that the district court did not have jurisdiction to consider the motion because it was filed beyond the time period allowed under the Rule. See Fed.

R. Crim. P. 33; see also United States v. Smith, 62 F.3d 641, 648 (4th Cir. 1995) (holding that time limits set forth in Fed. R. Crim. P. 33 are jurisdictional). Accordingly, we dismiss the appeal. 28 U.S.C. §2106 (1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX 2a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No.
RICHARD M. PATTERSON,	)	97-60-A
	)	
Defendant.	)	

O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED:

1) that Defendant's Motion for a New Trial is DENIED;

2) that Defendant's Request for an Evidentiary Hearing is DENIED;

3) that the Clerk shall forward copies of this Order to all counsel of Record.

/s/ James C. Cacheris
United States District Judge

March 28, 2001
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No.
RICHARD M. PATTERSON,	)	97-60-A
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant's motion for a new trial and request for evidentiary hearing. For reasons set forth below, the motions are denied:

I. Background

On February 19, 1997, a grand jury sitting in the Eastern District of Virginia returned a single-count indictment charging the Defendant Richard

M. Patterson ("Patterson") with kidnaping, in violation of Title 18, United States Code, section 1201(a). The indictment alleged that from on or about January 28, 1997 to on or about January 31, 1997, Patterson kidnaped Keith R. Cottrell ("Cottrell"), moving between the State of Maryland and the Commonwealth of Virginia.

At arraignment on March 3, 1997, Patterson pled not guilty, and a jury trial was et. Patterson made a motion to suppress two confessions he made on the day of his arrest on April 11, 1997. Following an evidentiary hearing, the motion to suppress was denied by Judge Spencer.

Trial began on April 22, 1997 and ended with the jury returning a verdict on

April 23, 1997, finding Patterson guilty of kidnaping. Patterson moved for a new trial and judgment of acquittal pursuant to Federal Rules of Criminal Procedure 33 and 29, respectively. The motions were denied by the Court on June 18, 1997.

On August 1, 1997, Patterson was sentenced to 121 months' imprisonment, five years supervised release, and ordered to pay a $100 special assessment. On August 6, 1997, Patterson filed his notice of appeal. On September 2, 1997, Patterson moved to set aside the conviction pursuant to 28 U.S.C. § 2255. Because his appeal was pending at that time, the Court denied his 2255 motion without prejudice on September 8, 1997. Thereafter Patterson moved to dismiss his

appeal, and on January 12, 1998, the Court of Appeals for the Fourth Circuit dismissed his appeal with prejudice.

Patterson's motion pursuant to section 2255 was denied without hearing by this Court on October 8, 1998, and the Defendant appealed. On May 5, 1999, the Fourth Circuit Court of Appeals dismissed his appeal. An en banc petition was filed on June 6, 1999, which was denied by the Court of Appeals on August 19, 1999. A petition for a writ of certiorari to the United States Supreme Court was denied. On July 26, 2000, Patterson filed a motion for a new trial and a request for an evidentiary hearing on the grounds of newly discovered evidence.

At trial, the evidence showed that on January 27, 1997 Patterson, Michael Patterson, Keith Maichle, and David Hess drove in Michael Patterson's Jaguar from Jacksonville, Florida to Rockville, Maryland in order to confront Keith Cottrell about some stock he had obtained from Michael Patterson. They acquired the key to Cottrell's residence at 54667 Grove Ridge Way, Rockville, Maryland, from Cottrell's roommate, Hans Nearhoff. The next day they drove to the residence and entered at 7 a.m., finding Cottrell asleep in his bedroom. They beat him several times with a lamp and threw him down a flight of stairs. Cottrell attempted to escape and ran through a glass door but was grabbed by Michael Patterson and Hess

before he could escape. His hands were tied using the lamp cord and tape. Hess produced a knife, and Cottrell was forced to sign an authorization to transfer approximately 75,000 shares of stock to the account of Michael Patterson as a condition of release. In addition, the individuals took one of Cottrell's credit cards during the incident and told him, "If you cooperate, you may live through this. If you don't, I really don't care." Testimony of Cottrell, Tr. 36. Hess told Cottrell, "You can either cooperate with us then. I don't care if you live through it or die through it; it doesn't matter to me. I just get paid either way". Tr. 29-30.

Once the stock had been transferred, defendant Patterson and the others took Cottrell from his residence in Rockville and drove him in Michael Patterson's car to Leesburg, Virginia. Michael Patterson rented two rooms at the Best Western Motel. Defendant and the others held Cottrell there against his will until January 30, then they moved to the Days Inn Motel. On January 31, when Defendant Richard Patterson was not looking, Cottrell dialed 911 from the room at the Days Inn and told the police he was being held against his will. Shortly thereafter, Patterson and Maichle escorted Cottrell to Michael Patterson's car in the motel parking lot, where they were arrested by police officers.

Defendant confessed to the interviewing detective, John A. Smith of the Leesburg Police Department. He told them that he stood at the base of the steps while the other three, his brother, Maichle, and Rock (a.k.a. David Hess) went upstairs to where Cottrell was sleeping. Patterson remained downstairs because he has a wooden leg, and he has trouble going up and down stairs. Defendant heard several thumps and a bang upstairs. They then drove Keith Cottrell to Leesburg. Tr. 177-180.

James Burrell, special agent of the FBI, interviewed Defendant on January 31, 1997 and advised him of his rights. Patterson waived his rights. See Government Exhibit 39. Defendant told

agent Burrell that he, Michael Patterson, Kenneth Michle, and David Hess traveled from the Jacksonville area to Rockville, Maryland, to work out a situation in which Cottrell owed his brother some money. Defendant told him that they met Hans Nearhoff at approximately 7 a.m. on the morning of January 28th and that Nearhoff gave Michael Patterson a key to the residence, which he shared with Keith Cottrell. Defendant, Michael Patterson, Hess and Maichle drove to the Cottrell/ Nearhoff residence. Defendant indicated that the other three individuals traveling with him, Michael Patterson, Hess, and Maichle, went to the second floor while the Defendant stayed on the bottom floor of the townhouse. Defendant heard a

struggle going on upstairs. He went to the second floor and saw the three men with Cottrell, who was lying in his bed. The five men then went downstairs. Defendant stated that Cottrell tried to run toward the sliding glass doors but was grabbed by Maichle and Hess and restrained. Cottrell's wrists were tied with a lamp cord, and his legs were secured with tape.

Defendant stated that Cottrell signed a piece of paper to transfer 74,000 shares of PLFM stock and $25,000 shares of TAGI stock from the account of Keith Cottrell to the account of Michael Patterson. The men told Cottrell they were going away for a few days to wait until the stock cleared. They then drove from Cottrell's

house in Rockville, Maryland to Leesburg, Virginia. Tr. 193-208.

II. Analysis

Defendant argues that there are four items of new evidence that warrant a new trial. They consist of: a pair of blue jeans, a leather jacket, cellular telephone records of Cottrell's girlfriend Debbie Savoy, and Cottrell's claim for restitution.

To determine whether a new trial should be granted under Rule 33 of the Federal Rules of Criminal Procedure[1] on

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[1] Rule 33 states, in relevant part: "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require ... A motion for new trial based on newly discovered evidence may be made only within three years after a verdict of finding of guilty." Fed. R. Civ. P. 33.

the basis of newly discovered evidence, the Fourth Circuit Court of Appeal uses a five-part test: "(i) is the evidence, in fact, newly discovered; (ii) are the facts alleged from which the court may infer due diligence on the part of the movant; (iii) is the evidence relied upon not merely cumulative or impeaching; (iv) is the evidence material to the issues involved; and (v) would the evidence probably result in acquittal in a new trial?" See United States v. Rhynes, 196 F.3d 207, 218 (4th Cir. 1999), citing United States v. Chavis, 880 F.2d 788, 793 (4th Cir. 1995).

The Court will first address the blue jeans and leather jacket. At trial, Cottrell testified that he had no clothing

other than what he was wearing at the time he was rescued by the police. During David Hess' trial, however, he acknowledged that the also had brown leather jacket with him. As for the blue jeans, Defendant claims that they were in a laundry bag in the trunk of the Jaguar, which was confiscated by law enforcement officers and given to Michael Patterson after Richard Patterson's trial. The jeans were not an issue at the Hess trial. Defendant argues that the jeans and jacket suggest that Cottrell actually left his house in an orderly fashion and consented to traveling to Virginia, thereby negating the required element of coercion.

Neither the blue jeans nor the jacket are newly discovered, and they could have

easily been discovered by due diligence. It was undisputed that the kidnappers gave Cottrell were clothes to wear. Moreover, during the 911 call received from Cottrell on January 31 by Loudoun County Emergency Dispatch, the dispatcher asked Cottrell if he had a coat, and Cottrell answered, "Yes". The transcript of the call was available for Patterson's review and investigation. If Patterson's attorney thought the jacket was an important issue, he could have used the transcript to impeach Cottrell. Also, the existence of blue jeans should have been known, as the jeans were confiscated by law enforcement, which Defendant admits in his motion. They remained available for Patterson's inspection on April 10, 1997 at the U.S.

Attorney's office in Alexandria, Virginia. See Gov. Opp. Exh. 3. March 21, 1997 letter from Assistant U.S. Attorney Rich to defense counsel Kiyonaga.

Even if the jeans were not among the physical evidence at the U.S. Attorney's office as Defendant argues, the evidence goes entirely to Cottrell's credibility and does not warrant granting of a new trial. See United State v. Custis, 988 F.2d 1355, 1359 (4th Cir. 1993). The kidnaping occurred in January. Thus, it is entirely reasonable that Cottrell would be given a pair of jeans and a jacket to wear but still have been forced to leave his residence against his will. The jury heard the Defendant's two confessions that

Cottrell was beaten and tied up by the four men. Thus, that Cottrell was permitted to bring a pair of jeans and a leather jacket does not negate his kidnaping.

Defendant also claims that a new trial is warranted because Cottrell perjured himself when he failed to testify that he had his leather coat with him, which he later admitted in the Hess trial. Relying on Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928) and its progeny, Defendant argues that a new trial may be granted where (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) without it the jury might have reached a different conclusion; and (c)

the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. See also, United States v. Wallace, 528 F.2d 863 (4th Cir. 1976). Defendant cannot meet this high standard. Even if Cottrell perjured himself and recanted his testimony, his false statements would not have led the jury to reach a different conclusion. The Government did not claim that Cottrell was an exemplary citizen by any stretch of the imagination. The incomplete testimony would not have negated Cottrell's credibility to the point that the jury would have rejected his entire testimony. At most, the fact that he failed to mention the jacket and

jeans suggests that he was not as harried as he may have said he was or that the kidnappers were not as cruel as he made them out to be. This is not a situation in which the witness is "utterly unworthy of being believed because he had lied consistently in a string of previous cases." United States v. Taglia, 922 F.2d 413, 415 (7th Cir. 1991). In reaching its decision, the jury considered Cottrell's testimony and the Defendant's two confessions that Cottrell was beaten and tied up. As such, the allegedly false statements do not rise to the level that warrant a new trial.

The next piece of allegedly new evidence is the cellular telephone records of Cottrell's girlfriend Debbie Savoy.

Patterson argues that Savoy would have testified that her phone was in Cottrell's possession and that the telephone records reflect that Cottrell had ready access to communication with third parties but did not exercise that communication. Defendant claims that the records only became available after Patterson's trial, but he admits that trial counsel may have been able to access the records had he chosen to do so. See Def's Mem. at 24, n. 7. Regardless of this inconsistency, the existence of a cellular phone, and thus the phone records, was or could have been known. The phone was found in the truck of Michael Patterson's Jaguar, and it was listed on the FBI report of items seized from the car. Again, the evidence was

made available for defense counsel's inspection at the U.S. Attorney's Office. With due diligence, Defendant could have subpoenaed, but did not, the cellular phone records.

Moreover, the phone was found in the trunk of the car, indicating that Cottrell lacked access to it. The cellular phone records show that no calls were made from the phone from January 21 to January 31, when a call to Jacksonville was placed. This call was made after Cottrell was freed from his captors. Thus, this evidence would not result in an acquittal.

Defendant next claims that Cottrell's restitution claim warrants the granting of a new trial. Specifically, he argues that the claim was grossly inflated, which

suggests that Cottrell was exploiting the opportunity to gain from the situation.[2] The issue of restitution, however, did not exist at the time of Patterson's trial. The verdict was returned on April 23, 1997, and the restitution claim arose on June 23, 1997. Even if it had existed, this evidence, as Defendant admits, would go solely to Cottrell's credibility. The mere fact that Cottrell made an inflated claim for restitution would not have acquitted Patterson.

Finally, Defendant claims that, contrary to Cottrell's testimony, his house was not "trashed" and his furniture

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[2] After Patterson's trial, Cottrell submitted a restitution claim in the amount of $340,235.00.

was not stolen. He claims that the house was meticulous and neat, reflecting a consensual departure, and that Cottrell's furniture was removed in an orderly fashion, suggesting that Cottrell consented to its removal to secure the debt he owed Michael Patterson. Defendant contends that he could not have known about the condition of the apartment because he was not there when Michael Patterson and David Hess organized the move of the furniture. Likewise, he claims that his brother's and Hess's testimony was not readily available to him because they were co-defendants.

Defendant, however, could have impeached Cottrell's characterization with

photos of the townhouse, which were available to the Defendant during trial. As to the allegedly orderly removal of the furniture, this evidence is not dispositive of whether Cottrell was in fact kidnaped.

III. Conclusion

In sum, the evidence on which Defendant relies for his motion for a new trial does not meet the five part test set forth in Rhynes, and therefore should be denied. An evidentiary hearing is unnecessary. An appropriate Order will issue.

/s/ James C. Cacheris
United States District Judge

March 28, 2001
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs.

C.A. No. 97-60-A

RICHARD M. PATTERSON

Defendant.

_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Defendant, **RICHARD M. PATTERSON,** hereby appeals to the United States Court of Appeals for the Fourth Circuit from an Order denying the Defendant's Motion for New Trial and Defendant's Request for an Evidentiary Hearing entered in this action on the 28th day of March, 2001.

Respectfully submitted this 11th day of April, 2001.

JACK R. MARO, ESQUIRE
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Attorney for Defendant
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/s/ Jack R. Maro
JACK R. MARO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been furnished by U.S. MAIL this 11th day of April, 2001, to: **M. LEE QUINN, SPECIAL ASST. U.S. ATTY.**, 2100 Jamieson Avenue, Alexandria, VA 22314.

/s/ Jack R. Maro
JACK R. MARO, ESQUIRE